SECTION A
OVERVIEW OF THE TRANSPORTATION CONFORMITY REQUIREMENTS AND PROCESS

Exhibit 7: Transportation Conformity Process

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OVERVIEW OF THE TRANSPORTATION CONFORMITY REQUIREMENTS AND PROCESS

This Section provides information on:

< Which transportation conformity requirements apply and when; and
< An overview of the conformity process.

The statutory basis for transportation conformity is found in the Clean Air Act Amendments (CAA) of 1990.[1] In addition, the Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991,[2] and now the Transportation Equity Act for the 21st Century (TEA-21)[3] reinforced the need for coordinated transportation and air quality planning through the metropolitan planning provisions. The CAA conformity provisions are interpreted through regulations that set out the procedures and criteria for compliance. The regulations governing implementation requirements are included in the Environmental Protection Agency's (EPA) transportation conformity rule[4] and ISTEA's metropolitan planning regulations.[5]

WHAT IS TRANSPORTATION CONFORMITY?

Transportation conformity is a way to ensure that Federal funding and approval are given to those transportation activities that are consistent with air quality goals. It ensures that these transportation activities do not worsen air quality or interfere with the "purpose" of the SIP, which is to meet the NAAQS.[6] Meeting the NAAQS often requires emissions reductions from mobile sources.

According to the CAA, transportation plans, programs, and projects cannot:

< Create new NAAQS violations;
< Increase the frequency or severity of existing NAAQS violations; or

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[1] CAA §176 (c); 42 U.S.C. §§7401 to 7671(q).

[2] ISTEA of 1991, Public Law 102-240, Dec. 18, 1991.

[3] TEA-21, Public Law 105-178, June 9, 1998.

[4] 40 CFR Parts 51 and 93, as amended by 62 FR 43780, Aug. 15, 1997.

[5] 23 CFR Part 450, 49, CFR Part 613.

[6] Any activity (funded, approved, permitted, etc.) undertaken by Federal agencies, other than the FHWA and the FTA, is governed by separate, general conformity regulations.

< Delay attainment of the NAAQS.

APPLICABILITY OF TRANSPORTATION CONFORMITY REQUIREMENTS

Below we discuss the applicability of the transportation conformity requirements including what the requirements are, where they apply and when they apply. The transportation conformity rule includes the following provisions on applicability:[7]

§93.102 Applicability.

(a) Action applicability.

(1) Except as provided for in paragraph (c) of this section or §93.126, conformity determinations are required for:

(i) The adoption, acceptance, approval or support of transportation plans and transportation plan amendments developed pursuant to 23 CFR part 450 or 49 CFR part 613 by an MPO or DOT;

(ii) The adoption, acceptance, approval or support of TIPs and TIP amendments developed pursuant to 23 CFR part 450 or 49 CFR part 613 by an MPO or DOT; and

(iii) The approval, funding, or implementation of FHWA/FTA projects.

(2) Conformity determinations are not required under this rule for individual projects which are not FHWA/FTA projects. However, §93.121 applies to such projects if they are regionally significant.

(b) Geographic Applicability. The provisions of this subpart shall apply in all nonattainment and maintenance areas for transportation-related criteria pollutants for which the area is designated nonattainment or has a maintenance plan.

(1) The provisions of this subpart apply with respect to emissions of the following criteria pollutants: ozone, carbon monoxide (CO), nitrogen dioxide (NO_2), and particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM_{10}).

(2) The provisions of this subpart apply with respect to emissions of the following precursor pollutants:

(i) Volatile organic compounds (VOC) and nitrogen oxides ($_{NOX}$) in ozone areas;

(ii) $_{NOX}$ in NO_2 areas; and

(iii) VOC, $_{NOX}$, and PM_{10} in PM_{10} areas if the EPA Regional Administrator or the director of the State air agency has made a finding that transportation-related precursor emissions within the nonattainment area are a significant contributor to the PM_{10} nonattainment problem and has so notified the MPO and DOT, or if the applicable implementation plan (or implementation plan submission) establishes a budget for such emissions as part of the reasonable further progress, attainment or maintenance strategy.

(3) The provisions of this subpart apply to maintenance areas for 20 years from the date EPA approves the area's request under §107(d) of the CAA for redesignation to attainment, unless the applicable implementation plan specifies that the provisions of this subpart shall apply for

[7] 40 CFR §93.102, as amended by 62 FR 43780, 43803, Aug. 15, 1997.

more than 20 years.

(c) Limitations[8].

(1) Projects subject to this regulation for which the NEPA process and a conformity determination have been completed by DOT may proceed toward implementation without further conformity determinations unless more than three years have elapsed since the most recent major step (NEPA process completion; start of final design; acquisition of a significant portion of the right-of-way; or approval of the plans, specifications and estimates) occurred. All phases of such projects which were considered in the

conformity determination are also included, if those phases were for the purpose of funding final design, right-of-way acquisition, construction, or any combination of these phases.

(2) A new conformity determination for the project will be required if there is a significant change in

project design concept and scope, if a supplemental environmental document for air quality purposes is initiated, or if three years have elapsed since the most recent major step to advance the project occurred.

WHAT ACTIONS ARE SUBJECT TO TRANSPORTATION CONFORMITY?

Exhibit 7 provides an overview of the conformity process and shows the key components of a transportation conformity determination. Each of the components is discussed below.

Transportation Plans and Transportation Improvement Programs

40 CFR 58 FR 62190, Nov. 24, 1993

This rule applies only to the conformity of transportation plans, programs, and projects developed, funded, or approved under title 23 U.S.C. or the Federal Transit Act. Criteria and procedures for determining the conformity of all other Federal actions "general conformity" including highway and transit projects which require funding or approval from a Federal agency other than FHWA or FTA, are promulgated in a separate rule.

40 CFR 58 FR 62205, Nov. 24, 1993

Recipients of title 23 U.S.C. or Federal Transit Act funds include recipient agencies at any level of State, county, city, or regional government. Private landowners or developers, and contractors or grant recipients (including local government agencies) which are only paid for services or products created by their own employees, are not considered recipients of funds. That is, if an agency receives title 23 U.S.C. or Federal Transit Act funds and then uses the funds to pay private landowners or developers, contractors, or grant recipients, the private entities/contractors/grant recipients are not thereby considered recipients of Federal funds for the purposes of this requirement, and their other non-Federal projects would not be subject to this requirement.

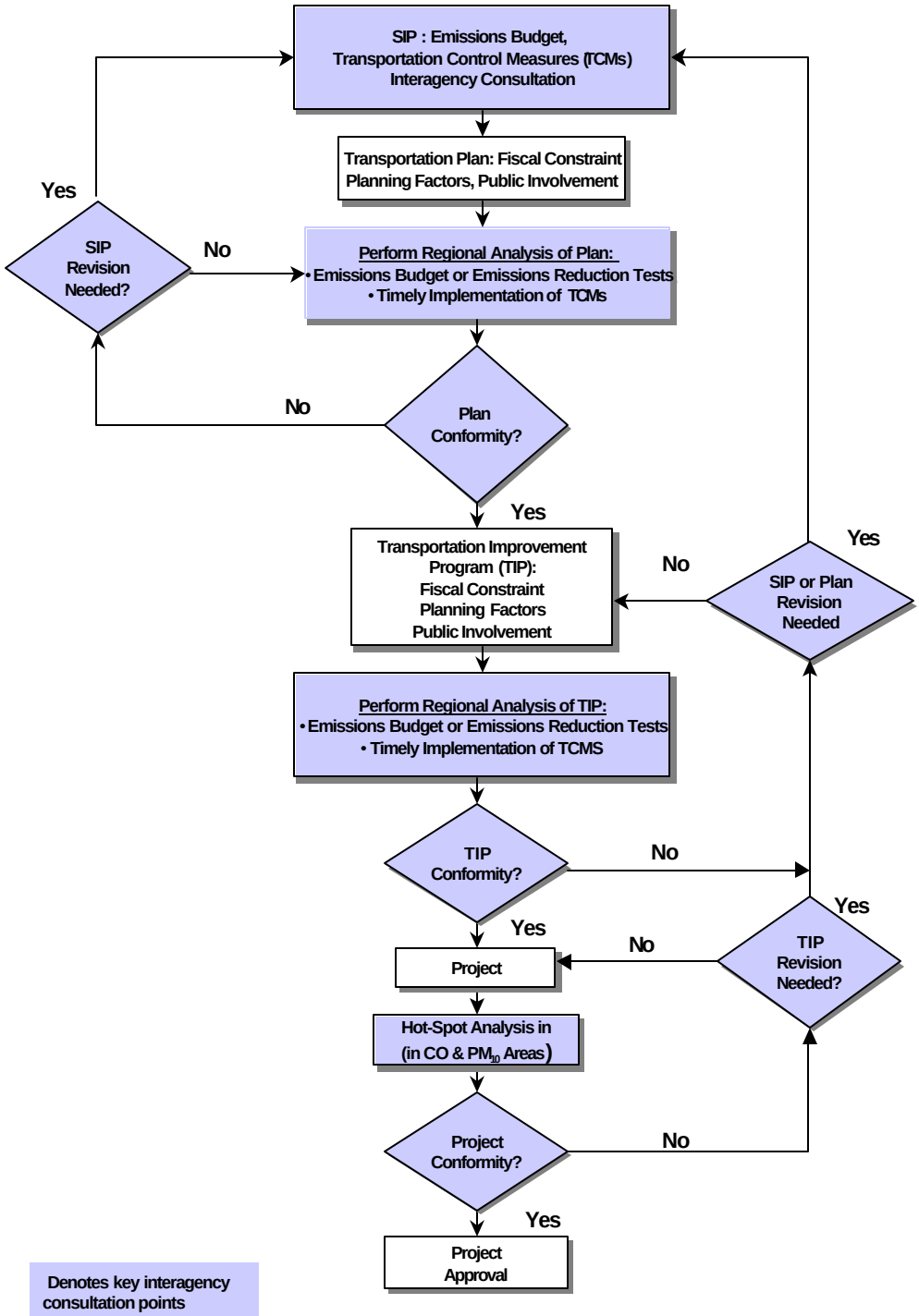
[8] This section of the rule (93.102(c)) was affected by the March 2, 1999 Court decision.

Furthermore, projects which do not involve any participation by recipients of Federal funds are not subject to this requirement.

The CAA requires that transportation plans, programs, and projects in nonattainment or maintenance areas that are funded or approved by the FHWA or FTA be in conformity with SIPs through the process described in the EPA's transportation conformity regulation. Following are excerpts from the preamble to the 1993 transportation conformity rule that discuss the issues of recipient agencies and conformity of actions funded or approved by Federal agencies other than FHWA/FTA.

ISTEA, and now TEA-21 require that MPOs have transportation plans in place that present a twenty-year perspective on transportation investments for the region. The transportation improvement program (TIP) is a multi-year prioritized list of fiscally-constrained projects (three-to-seven years)

Exhibit 7
Transportation Conformity Process



Source: Federal Highway Administration

proposed to be funded or approved by FHWA or FTA. The TIP must be consistent with the conforming transportation plan, and the TIP must be found to conform to the SIP. Specifically, the transportation plan/TIP must result in emissions consistent with those allowed in the SIP. Regionally significant[9] transportation projects, regardless of funding source, must be accounted for in the plan/TIP conformity analysis. In rural nonattainment or maintenance areas the State department of transportation must ensure that regionally significant Federally funded or approved projects conform to the SIP.

Project Level Conformity

FHWA/FTA projects must be found to conform before they are adopted, accepted, approved or funded. With some exemptions[10] (e.g. safety, landscaping and other projects with neutral or de minimis emissions impacts), transportation projects: 1) must come from a conforming transportation plan/TIP, 2) the design concept and scope of the project that was in place at the time of the conformity finding must be maintained through implementation, and 3) project design concept and scope had to be sufficiently defined to determine emissions at the time of the plan/TIP conformity determination. If a project does not meet the above three criteria, its emissions, when considered with the emissions projected for the conforming transportation plan and program, can not cause the plan and program to exceed the emissions budget in the SIP. Areas that have carbon monoxide (CO) or particulate matter (PM-10) problems must also show that new localized violations (or "hot spots") of those pollutants will not result from project implementation.

WHO MAKES CONFORMITY DETERMINATIONS?

The MPO and U.S. DOT (FHWA/FTA) have a responsibility to ensure that the transportation plan and program within the metropolitan boundaries conform to the SIP. In metropolitan areas, the governing board of each MPO must formally make a conformity determination on its transportation plan/TIP prior to submitting them to the U.S. DOT (FHWA/FTA) for review and approval. Conformity determinations for projects outside of these boundaries are the responsibility of the U.S. DOT (FHWA/FTA) and the project sponsor, which usually is the State DOT.

In addition, the National Memorandum of Understanding issued on April 19, 2001, provides the EPA and DOT with a framework for coordinating and working through issues in the conformity and SIP processes. Specifically, the MOU's provisions ensure that:

1) EPA and DOT consult on conformity determinations before DOT's approval process;

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[9] 40 CFR §93.101, as amended by 62 FR 43803, Aug. 15, 1997. Regionally significant project means a project that is on a facility which serves regional transportation needs and would normally be included in the modeling of a metropolitan area's transportation network, including, as a minimum, all principal arterial highways and all fixed guide-way transit facilities that offer a significant alternative to regional highway travel.

[10] 40 CFR §93.126, as amended by 62 FR 43816-7, Aug. 15, 1997.

2) the conformity rule's provisions are appropriately applied with regard to conformity determinations; and

3) adequate interagency consultation persists through the planning and conformity processes to identify and resolve issues prior to a conformity lapse or freeze.

WHERE DOES TRANSPORTATION CONFORMITY APPLY?

Transportation conformity applies in the following areas[11]:

< All EPA-designated nonattainment areas for transportation-related criteria pollutants,
< Maintenance areas[12] for transportation-related criteria pollutants for 20 years from the date EPA approves the State's request for redesignation as a maintenance area.

TO WHICH POLLUTANTS OR POLLUTANT PRECURSORS DOES TRANSPORTATION CONFORMITY APPLY?

Transportation conformity applies to the following criteria pollutants:

< Ozone,
< Carbon monoxide (CO),
< Nitrogen dioxide (NO_2), and
< Particles with an aerodynamic diameter less than or equal to 10 microns (PM-10).

Transportation conformity applies to the following precursor pollutants:

< Volatile organic compounds (VOCs) and nitrogen oxides ($_{NOX}$) in ozone nonattainment areas,
< $_{NOX}$ in nitrogen dioxide (NO_2) areas; and
< VOC, $_{NOX}$, and particulate matter in PM-10 areas under the following conditions:

40 CFR §93.102(b)(2)(iii)

> *"...if the EPA Regional Administrator or the State air agency has made a finding that transportation-related precursor emissions within the nonattainment area are a significant contributor to the PM_{10} nonattainment problem and has so notified the MPO and DOT, or if the applicable implementation plan (or implementation plan submission) establishes a budget for such*

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[11] 23 U.S.C. §§101-128, The National Highway System Designation Act of 1995, limited conformity to only nonattainment and maintenance areas.

[12] Maintenance area means any geographic region of the United States previously designated nonattainment pursuant to the CAA Amendments of 1990 and subsequently redesignated to attainment subject to the requirement to develop a maintenance plan under section 175A of the CAA, as amended. 40 CFR §93.101, as amended by 62 FR 43802, Aug. 15, 1997.

emissions as part of the reasonable further progress, attainment or maintenance strategy."

FREQUENCY OF TRANSPORTATION CONFORMITY DETERMINATIONS

40 CFR §93.104

a) Conformity determinations and conformity redeterminations for transportation plans, TIPs, and FHWA/FTA projects must be made according to the requirements of this section and the application implementation plan.
(b) Frequency of conformity determinations for transportation plans.
(1) Each new transportation plan must be demonstrated to conform before the transportation plan is approved by the MPO or accepted by DOT.
(2) All transportation plan revisions must be found to conform before the transportation plan revisions are approved by the MPO or accepted by DOT, unless the revision merely adds or deletes exempt projects listed in §93.126 or §93.127. The conformity determination must be based on the transportation plan and the revision taken as a whole.
(3) The MPO and DOT must determine the conformity of the transportation plan no less frequently than every three years. If more than three years elapse after DOT's conformity determination without the MPO and DOT determining conformity of the transportation plan, the existing conformity determination will lapse.
(c) Frequency of conformity determinations for transportation improvement programs.
(1) A new TIP must be demonstrated to conform before the TIP is approved by the MPO or accepted by DOT.
(2) A TIP amendment requires a new conformity determination for the entire TIP before the amendment is approved by the MPO or accepted by DOT, unless the amendment merely adds or deletes exempt projects listed in §93.126 or §93.127.
(3) The MPO and DOT must determine the conformity of the TIP no less frequently than every three years. If more than three years elapse after DOT's conformity determination without the MPO and DOT determining conformity of the TIP, the existing conformity determination will lapse.
(4) After an MPO adopts a new or revised transportation plan, conformity of the TIP must be redetermined by the MPO and DOT within six months from the date of DOT's conformity determination for the transportation plan, unless the new or revised plan merely adds or deletes exempt projects listed in §§ 93.126 and 93.127. Otherwise, the existing conformity determination for the TIP will lapse.
(d) Projects. FHWA/FTA projects must be found to conform before they are adopted, accepted, approved, or funded. Conformity must be redetermined for any FHWA/FTA project if three years have elapsed since the most recent major step to advance the project (NEPA process completion; start of final design; acquisition of a significant portion of the right-of-way; or approval of the plans, specifications and estimates) occurred.
(e) Triggers for transportation plan and TIP conformity determinations. Conformity of existing transportation plans and TIPs must be redetermined within 18 months of the following, or the existing conformity determination will lapse, and no new project-level conformity determinations may be made until conformity of the transportation plan and TIP has been determined by the MPO and DOT;
(1) November 24, 1993;
(2) The date of the State's initiation submission to EPA of each control strategy implementation

plan or maintenance plan establishing a motor vehicle emissions budget;
(3) EPA approval of a control strategy implementation plan revision or maintenance plan which establishes or revises a motor vehicle emissions budget;
(4) EPA approval of an implementation plan revision that adds, deletes, or changes TCMs; and
(5) EPA promulgation of an implementation plan which establishes or revises a motor vehicle emissions budget or adds, deletes, or changes TCMs.

WHEN IS A TRANSPORTATION CONFORMITY DETERMINATION REQUIRED?

Conformity must be determined:

- One year after the effective date of a nonattainment designation in an area that is designated nonattainment for the first time (newly designated nonattainment area).
- Prior to approval of new transportation plans/TIPs or plan/TIP amendments, and
- Prior to Federal approval or funding of projects.

For newly designated nonattainment areas, the one year grace period noted above results from an amendment to Section 176(c) of the Clean Air Act by the Congress in the FY2001 EPA Appropriations Act. This one-year grace period only applies to areas that are newly designated nonattainment and does not affect areas that were previously designated nonattainment or which have been redesignated to attainment for any national ambient air quality standard pursuant to section 175(A) of the CAA. See Appendices A and F.

HOW OFTEN MUST CONFORMITY BE DETERMINED?[13]

- At least every three years for transportation plans/TIPs;
- For TIPs, within six months of MPO approval of a new or revised transportation plan;
- Within 18 months of:
  - -the date of initial SIP submission establishing motor vehicle emissions budget(s);
  - -EPA approval of a SIP that creates or revises a budget;
  - -EPA approval of a SIP that adds, deletes, or changes TCMs; and
  - -EPA promulgation of a Federal Implementation Plan (FIP) which creates or revises a budget or adds, deletes, or changes TCMs**.**

WHEN DOES THE THREE-YEAR CLOCK START FOR A TRANSPORTATION PLAN OR TIP?

The three-year clock starts when the DOT makes the conformity determination on the MPO plan or TIP, not the date when the MPO transmits the plan to DOT. If more than three years elapse after the DOT

[13] 40 CFR §93.104(e), as amended by 62 FR 43780, 43804, Aug. 15, 1997.

makes a MPO conformity determination, and a new conformity determination is not made, then the existing conformity determination will lapse. Refer to Chapter 1 for a complete discussion of plan/TIP requirements.

WHAT IS A CONFORMITY LAPSE?

40 CFR §93.101, as amended by 62 FR 43802, August 15, 1997, Definitions

> *Lapse means that the conformity determination for a transportation plan or TIP has expired, and thus there is no currently conforming transportation plan/TIP.*

A conformity lapse occurs when an area fails to satisfy the frequency requirements (time frame for making a conformity determination). A lapse can also result from a SIP failure. A discussion on conformity lapsing, causes and consequences is provided in Chapter 4.

Transportation planning regulations require that, in nonattainment and maintenance areas, the long range (20-year) transportation plan be updated every three years. This schedule should also correspond with the three-year frequency requirement for a transportation conformity determination.

WHAT ARE THE MAJOR REQUIREMENTS OF THE TRANSPORTATION CONFORMITY PROCESS?

The major requirements of the transportation conformity process include:

- Interagency consultation,
- Regional emissions analysis,
- Project level analysis,
- For TCMs that are included in an approved SIP, assurance of timely implementation of TCMs, and
- Certain ISTEA, now TEA-21, planning requirements (e.g., fiscal constraint) (see Chapter 3).

Interagency Consultation

The interagency consultation process is the formal coordinating mechanism among transportation and air agency staffs and is central to the entire conformity process. Interagency consultation is discussed in detail in Chapter 2. The interagency consultation procedures apply to the development of the SIP, the transportation plan, the TIP, projects, and conformity determinations. Exhibit 13 in Chapter 2 shows the general requirements and typical roles and responsibilities of the agencies involved in transportation conformity. The interagency consultation process, which is tailored to each area, must be documented and incorporated into the SIP as a conformity SIP revision. In addition, the conformity SIP revision includes verbatim incorporation of specific transportation conformity rule provisions. A complete discussion of SIP

requirements is provided in Part III, Section B.

Regional Emissions Analysis

Regional emissions analysis must be conducted in order to assess the regional impacts that transportation investments will have on emissions within the nonattainment or maintenance area. The latest EPA-approved emissions models must be used to estimate regional emissions. These estimates are derived from grams of pollutant per mile traveled and are based upon the output of the travel demand model. The general requirements for conducting regional emissions analysis which apply to all areas at all times are discussed in detail in Chapter 5. Specific requirements for regional analysis that are based upon pollutant type and classification are discussed in Chapters 6, 7, & 8.

Project Level Emissions Analysis

In CO and PM-10 nonattainment and maintenance areas, FHWA/FTA projects must be found to conform *before they are adopted, accepted, approved or funded*. The rule[14] prohibits any FHWA/FTA project from causing or contributing to any new localized CO or PM-10 violations or the increasing the severity of existing violations. Transportation projects must conform to the following criteria:

- Projects must come from a conforming transportation plan/TIP;
- The design concept and scope of the project at the time of NEPA approval must be consistent with the regional conformity analysis or a new conformity determination and analysis is required; and,
- The project design concept and scope must be sufficiently defined at the time of the conformity determination on the Plan and/or TIP to determine emissions.

If a project does not meet the above three criteria, the project cannot be found to conform. The project must be included in the plan/TIP and its regional emissions analysis according to the final design and scope. Chapter 5 includes a discussion of exceptions to these criteria for projects which have completed the NEPA process. Section F discusses the project level analysis requirements and procedures for projects not from a conforming plan TIP.

Where Does Project Level Analysis Apply?

Project level conformity analysis applies only to CO and PM-10 nonattainment and maintenance areas and is based on quantitative analysis using applicable EPA approved air quality models. Air quality dispersion models (e.g. CALINE4, CAL3QHC) are used to evaluate localized impacts (project level impacts) of carbon monoxide emissions and nonattainment and maintenance areas may establish their own CO protocols through the conformity SIP and interagency consultation processes.

[14] 40 CFR §§93.116, 93.123, as amended by 62 FR 43780, 43810, 43815, Aug. 15, 1997.

Areas can establish their own procedures for quantitative analysis with EPA approval. *In some cases, and with EPA approval, qualitative analysis may be used*. Quantitative PM-10 hot-spot analysis will not be required until EPA releases modeling guidance on this issue and announces it in the *Federal Register*. However, qualitative PM-10 hotspot analysis is required prior to project-level approvals. The consultation process should be used to complete the qualitative analysis, and this analysis should be documented in the conformity determination.

For Which Projects Is Quantitative Analysis Required?

Quantitative analysis is required[15] for the following:

- Projects in or affecting locations, areas, or categories of sites that are identified in the applicable SIP as sites of violation or possible violation;
- Any project affecting one or more of the top three intersections with the highest traffic volumes, or worst level of service (LOS) in a nonattainment or maintenance area as identified in the applicable SIP; and,
- Projects affecting intersections at level of service (LOS) D, E, or F, or those projected to change to LOS D, E, or F because of increased traffic volumes.

TRANSPORTATION CONTROL MEASURES

The rule defines transportation control measures (TCMs) as:

40 CFR §93.101, as amended by 62 FR 43780, 43803, August 15, 1997

> *Any measure that is specifically identified and committed to in the applicable implementation plan that is either one of the types listed in §108 of the CAA (See Exhibit 14), or any other measure for the purpose of reducing emissions or concentrations of air pollutants from transportation sources by reducing vehicle use or changing traffic flow or congestion conditions. Notwithstanding the above, vehicle technology-based, fuel-based, and maintenance-based measures which control the emissions from vehicles under fixed traffic conditions are not TCMs for the purposes of this subpart.*

When are TCMs included in a SIP?

Nonattainment and maintenance areas can include TCMs in the SIP as control measures to support the

[15] 40 CFR §93.123(a), as amended by 62 FR 43815, Aug. 15, 1997 provides that "*these procedures shall be used..., unless different procedures developed through the interagency consultation process required in 40 CFR §93.105 and approved by the EPA Regional Administrator are used.*"

SIP's demonstration or as contingency measures.[16] If TCMs are included as control measures in the applicable SIP, they must be implemented and timely implementation demonstrated as part of the conformity determination. A detailed discussion of TCMs including criteria for enforceability, public participation, timely implementation and analysis techniques is discussed in Chapter 3.

When Do TCMs Need to Be Implemented?

If TCMs are included in the SIP, they must meet all SIP requirements (See Section B) and metropolitan planning requirements under 23 CFR 450 (See Chapter 1). Compliance with the SIP requirements will ensure that such TCMs can be implemented.

What Is Timely Implementation of TCMs?

In areas where TCMs are included in an approved SIP, the MPO, the State, and DOT must ensure that TCMs have funding consistent with the SIP schedule for timely implementation. This is required for a conformity determination and is incorporated into the conformity process to insure that TCMs are not postponed due to lack of a funding commitment. This can be a useful tool in reinforcing the linkages between SIPs and transportation plans and TIPs, and may require local, regional, and State transportation officials to make investment trade-offs between projects to ensure those TCMs included in approved SIPs are implemented. Chapter 3 discusses specific criteria for determining timely implementation of TCMs.

[16] 42 U.S.C. §7502, Section 172 (c)(9).